

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 9

In the Matter of

HENSHUE CONSTRUCTION, INC. <sup>1/</sup>

Employer

and

Case 9-RC-17445  
(Formerly 30-RC-6212)

INTERNATIONAL BROTHERHOOD OF  
ELECTRICAL WORKERS LOCAL 2150, AFL-CIO

Petitioner

and

INTERNATIONAL UNION OF OPERATING  
ENGINEERS LOCAL 139, AFL-CIO

Intervenor

and

WISCONSIN LABORERS DISTRICT COUNCIL

Intervenor

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein called the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, <sup>2/</sup> the undersigned finds:

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<sup>1/</sup> The name of the Employer appears as amended at the hearing.

<sup>2/</sup> All parties timely filed briefs which I have carefully considered in reaching my decision.

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction.
3. The labor organizations involved claim to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The Employer, a corporation with an office and principal place of business at Madison, Wisconsin, is a construction industry contractor<sup>3/</sup> engaged in the underground installation of piping and telecommunications cables. It employs approximately 43 construction employees in its telecommunications division, the only group of employees involved in this proceeding.<sup>4/</sup>

The Petitioner claims that by virtue of an existing Section 8(f) contract, it represents a unit comprised of all construction employees (operators and laborers) employed in the Employer's telecommunications division<sup>5/</sup> in the State of Wisconsin and seeks an election to obtain status as the Section 9(a) representative of those employees. The International Union of Operating Engineers Local 139, AFL-CIO, herein called Intervenor Operators, claims that pursuant to an existing contract, it is the Section 9(a) representative of the Employer's operators and that the contract bars an election in any unit including those employees. The Wisconsin Laborers District Council, herein called Intervenor Laborers, claims that it has an existing contract covering the Employer's laborers, that it is the Section 9(a) representative of those employees, and that its contract bars an election in any unit including the laborers. Intervenor Operators and Intervenor Laborers, collectively referred to herein as the Intervenors, assert that the overall unit sought by the Petitioner is inappropriate and that only separate units of operators and laborers are appropriate. Further, the Intervenors are unwilling to proceed to an election in the overall unit sought by the Petitioner. On the other hand, the Petitioner and the Employer maintain that the overall unit sought by the Petitioner is the only appropriate unit and that separate units consisting of operators and laborers, respectively, are not appropriate. The Petitioner and the Employer contend that neither of the Intervenors has a contract with the Employer which would bar an election among any of the employees sought by the Petitioner. Finally, the Employer maintains that David Decker, Eric Egge and Adam Burkhalter, its job superintendents, are supervisors

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<sup>3/</sup> The parties stipulated the Employer is engaged in the construction industry. Accordingly, I find that the Employer is a construction industry employer within the meaning of Section 8(f) of the Act.

<sup>4/</sup> The Employer employs employees in its sewer and water division who are separately represented by various labor organizations. None of the parties contend that the instant petition raises any question concerning representation among any of the sewer and water division employees or that any of the telecommunications division employees should be included in any of the sewer and water division bargaining units.

<sup>5/</sup> Unless otherwise specified, reference to the Employer's employees shall mean construction employees in its telecommunications division.

within the meaning of Section 2(11) of the Act but the parties were unable to stipulate to that effect. <sup>6/</sup>

Evidence of the historical representation of the employees in the telecommunications division, presented by testimony of Henshue, and a list of the employees' names and job classifications disclose that the Employer classifies 10 employees as foremen, 5 of whom are represented by the Petitioner, 3 by Intervenor Laborers, 1 by Intervenor Engineers and 1 whose union representation is not disclosed on the record. In addition, the Employer classifies 18 employees as operators, 13 of whom are represented by the Petitioner, 1 by Intervenor Laborers, 3 by Intervenor Operators and 1 whose representation is not disclosed. Finally, the Employer classifies 14 as laborers, 6 of whom are represented by Petitioner, 6 by Intervenor Laborers and 2 whose representation is not disclosed. The Employer also employs a splicer represented by Intervenor Laborers.

Another way to describe the representation status of the telecommunication employees is that of the 24 employees represented by the Petitioner, 5 are classified as foremen, 13 as operators and 6 as laborers. With respect to the 11 employees represented by Intervenor Laborers, 3 are classified as foremen, 1 as an operator, 6 as laborers and 1 as a splicer. One employee represented by Intervenor Operators is classified as a foreman and 3 as operators. The representation status of a foreman, an operator and two laborers is not disclosed on the record.

The record does not disclose how a particular employee becomes represented by one of the three labor organizations; the criteria, if any, used to determine union representation; by whom such a determination might be made; or whether the determination is made before or after an employee is hired. Although a plausible explanation is that the determination is based on union membership, I am unable to conclusively determine that the contracts have been applied only to members. For example, there is no evidence of any remittances to the Petitioner and no evidence of the basis on which remittances to the Intervenor are determined.

The record reflects that the Employer's operators operate heavy equipment (backhoes and directional boring machines) to dig and backfill trenches or bore underground holes for the laying of conduit and/or cable. The laborers are responsible for actually laying or pulling the conduit and/or cable in the trenches or holes as well as utilizing hand tools to assist in the clearance of the hole or the backfilling of the trench. The laborers also perform locator work to keep directional drilling operations aligned, but the record is unclear as to the nature of this

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<sup>6/</sup> Although the Petitioner and the Intervenor apparently contend that Decker, Egge and Burkhalter are employees within the meaning of the Act, they failed to elicit testimony on that issue. The position of the labor organizations appears to be based on the fact that the classification of general foreman is included in each collective-bargaining agreement. The unchallenged testimony of the Employer's president, Gary Henshue, however, discloses that Decker, Egge and Burkhalter are job superintendents and possess authority requiring the exercise of discretion and independent judgment to discipline employees, schedule them for overtime and direct their work. Henshue also testified that James Showen, the telecommunications division manager who supervises Decker, Egge and Burkhalter, has authority to hire and discharge employees. Inasmuch as Henshue's testimony regarding the supervisory status of these individuals is un rebutted, I find that Showen, Egge, Burkhalter and Decker are supervisors within the meaning of Section 2(11) of the Act and I shall exclude them from the unit found appropriate.

work. Laborers are not supposed to operate heavy equipment, but they occasionally do so by moving it from one location to another. Equipment such as compressors, generator sets, vacuum excavation units and on-road trucks and their trailers, collectively referred to as auxiliary equipment, may be operated by either operators or laborers. However, the record does not reflect the extent to which either of these classifications operate such equipment. Moreover, the record does not disclose the functions of this auxiliary equipment but it appears that the Employer draws a distinction in job assignments between heavy equipment, which only operators should operate and the auxiliary equipment which may be operated by any employee.<sup>7/</sup> The record does not reflect the amount of their work time operators or laborers spend operating auxiliary equipment or the amount of time operators spend operating heavy equipment.

The record indicates that training is required in order to operate heavy equipment, but does not reflect the nature or extent of such training. Likewise, the record fails to indicate who among the Employer's employees have completed such training. Similarly, although the Employer provides on-the-job training for operating directional drilling equipment, the extent of such training is not specified. Henshue testified that many of the employees possessed farming experience prior to being hired and therefore knew how to operate a backhoe. Henshue further stated that the Employer has apprenticeship programs, but the record does not contain any detail concerning them. Indeed, none of the Employer's employees are currently either enrolled in an apprenticeship program or classified as journeymen. Some of the employees have commercial drivers licenses that enable them to haul equipment on public roads, but the record does not reflect which employees possess such licenses.

The employees work in crews consisting of one to six employees, including a foreman. The record does not specify the duties or functions of the foreman, except that such employee is responsible for overseeing the work of the crew and may also be the crew's operator. There is no contention or evidence that the foremen are statutory supervisors. Although the composition of the crews vary, the record does not disclose whether the employees are grouped for supervision purposes along crew lines or if employees in the same crew are supervised by different persons according to their job classification. It appears, however, that most crews have at least one operator and one laborer.

The splicer is responsible for splicing fiber optic cable. The record does not reflect how the splicer is supervised, the amount of training required for his position, or the nature of the crews on which he might work. When not performing splicing work, the splicer is designated as a laborer and is represented by Intervenor Laborers.

The record discloses that the Employer pays wage rates in excess of those set forth in the respective collective-bargaining agreements. However, the record does not specify the actual wage rates paid to the employees in any classification or pursuant to any contract.

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<sup>7/</sup> Henshue did not draw a distinction between heavy and auxiliary equipment in his testimony and referred to each generically as equipment. However, when testifying about the auxiliary equipment, Henshue related that it was operated by either operators or laborers. In other portions of his testimony, Henshue stated that laborers were not supposed to operate equipment. Considering Henshue's testimony in its entirety, I infer that he was referring to heavy equipment as the equipment that laborers should not operate.

The Employer first went into business in 1929. It created its telecommunications division in 1995 but did not hire construction employees for that division until March 1997. Prior to hiring any employees, in November or December 1996, the Employer signed a collective-bargaining agreement, effective by its terms from February 1, 1994 to January 31, 1997, with Intervenor Operators which contained, *inter alia*, the following provisions:

The Employer hereby recognizes and acknowledges that the Union is the exclusive representative of all employees in the classifications of work covered by this agreement, for the purpose of collective bargaining, as provided for in 9(a) of the Labor Management Relations Act of 1947.

The Employer acknowledges that the Union has demonstrated that a majority of the employer's employees covered by this agreement have authorized the Union to be their exclusive collective bargaining representative.

It appears that this contract with Intervenor Operators was the first time in which the Employer recognized any labor organization as a representative of any of its telecommunications division employees. The Intervenor Operators maintains it covers the Employer's operators. The contract contains a standard construction union security clause providing that employees shall become members after their 8<sup>th</sup> day of employment. By its terms this contract expired before the Employer ever hired any employees.

The Intervenor Operators subsequently negotiated a multi-employer contract, applicable to signatory employers, effective by its terms from February 1, 1997 <sup>8/</sup> to January 31, 2000, herein called Intervenor Operators' 1997 contract, which the parties stipulated constituted a collective-bargaining agreement between the Employer and Intervenor Operators. <sup>9/</sup> This agreement contains a standard union security clause and the same recognition clause as the predecessor 1994 agreement. <sup>10/</sup> The Intervenor Operators' 1997 contract further provides that:

#### ARTICLE VII(C) WAGE RATES AND CLASSIFICATIONS

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<sup>8/</sup> As noted above, the Employer did not hire employees in its telecommunications division until March 1997.

<sup>9/</sup> The Employer never signed this contract but apparently complied with at least some of its terms by remitting union dues and fringe benefit fund contributions on behalf of some of its employees.

<sup>10/</sup> Appendix A of the contract sets forth wage rates for operators, assistant operators, oilers and helpers.

The Employer hereby assigns all work that is to be performed in the categories described herein to employees in the bargaining unit covered by this agreement as listed in Appendix A. The work coming under the jurisdiction of the Union and covered by the terms of this contract includes the employees for operation and maintenance and repair of the following equipment: All cranes, trenching machines, backhoes, draglines, bulldozers, boom cats, angle dozers, backfillers, cleaning machines, wrapping machines, tow tractors, bending machines, welding machines, pumps, forklifts, boring machines, directional boring machines, cable plows, straightening machines, any other power-operated equipment, and all work incidental to the fiber optics and cable installation.

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#### ARTICLE XIX EFFECTIVE DATE, TERMINATION AND RENEWAL

A. This Agreement shall become effective February 1, 1997, when signed by the parties hereto, and shall remain in full force and effect until its termination, as provided below.

B. The provisions of this agreement shall continue in full force and effect until January 31, 2000, and thereafter from year to year until terminated at the option of either party after sixty (60) days' notice before the annual date in writing to the other.

On November 30, 1999, Intervenor Operators sent a letter to the Employer with a subject header reading "Reopener Notice - Fiber Optic Cable Installation Agreement." The letter states:

In accordance with Article XIX, opening provisions of the [Intervenor Operators' 1997 contract], please be advised that the International Union of Operating Engineers desires to open contract negotiations.

A representative will be in contact with you in the near future for the purpose of collective bargaining.

Thereafter, the Intervenor Operators negotiated a successor multi-employer contract, herein called Intervenor Operators' 2000 contract, applicable to signatory employers, which became effective for a 3-year period beginning February 1, 2000. The record does not disclose the identity of the employers who were party to these negotiations and there is no evidence that the Employer signed or consciously agreed to be bound by the terms of the 2000 agreement. The 2000 contract covers the same classification of employees as the predecessor contract and

includes the same union security language. The 2000 contract also provides for increases in the hourly rate for contributions to fringe benefit funds beginning with the month of February 2000.

The record shows that since at least May 1999, the Intervenor Operators' fringe benefit funds sent monthly pre-printed remittance report forms to the Employer with the hourly contribution rates pre-printed on the form and that the Employer made contributions at the those rates for the employees represented by Intervenor Operators. Further, for March, April and May 2000 the fund billed the Employer at the rates in Intervenor Operators' 2000 contract and the Employer contributed at those rates. On April 15, 2000, the Employer signed the March 2000 fund report. The pre-printed language on the reports reads:

I (we) agree to be bound by all of the provisions (including making payments) relating to pension, health, vacation, and education funds, as contained in the respective areas' labor agreements covering employees in the trade for which this report is made, for our (my) employees in such trade, for the duration of such labor agreements, and, further, agree to be bound by the applicable trust agreements.

Initially, the Intervenor Operators maintain that the 1997 contract automatically renewed. Moreover, Intervenor Operators contend that by signing the fringe benefit fund reports containing the above language and paying the rates specified in its 2000 contract, the Employer adopted the 2000 contract by its conduct, thereby barring an election in any unit which includes the Employer's operators. However, the record reveals that at a May 3, 2000 meeting, the Employer told representatives of Intervenor Operators that it did not have a valid or signed contract with that labor organization. Further, at a meeting on June 1, 2000, Intervenor Operators presented the Employer with a copy of its 2000 contract and the Employer declined to sign it because of the pending petition in the instant proceeding.

Subsequent to the above events culminating in an initial contractual relationship with Intervenor Operators, on June 2, 1997, the Employer signed a collective-bargaining agreement with Intervenor Laborers, herein called Intervenor Laborers' 1997 contract, effective by its terms from June 1, 1997 to May 31, 2000. The Intervenor Laborers' 1997 contract contains the following provisions:

### ARTICLE III

#### UNION RECOGNITION AND UNION SECURITY RECOGNITION OF EMPLOYER RIGHTS

A. The Employer hereby recognizes and acknowledges that the Union is the exclusive representative of all employees in the classifications of work covered by this Agreement for the purpose of collective bargaining, as provided by the Labor Management Relations Act of 1947.

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## ARTICLE VI

### CLASSIFICATION

A. The work coming under the jurisdiction of the union and covered by the terms of this Agreement includes, but is not limited to, the laborers' work for the clearance of right-of-way preparatory to the installation of cable, the demolition and removal of fence, all boring work, the digging and trimming of trenches and ditches for cable; work in connection with the installation of same, handling of cable, and installation of terminal housings, splicing, pole climbing, termination of cables, and all phases of other cable work. All other general and miscellaneous laborers' work in connection with the entire operation, falling within the jurisdiction of the union. <sup>11/</sup>

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## ARTICLE XIII

### EFFECTIVE DATE, TERMINATION AND RENEWAL

A. This Agreement shall become effective June 1, 1997 when signed by the parties hereto and shall remain in full force and effect until its termination as provided herein below.

B. The provisions of this Agreement shall continue in full force and effect until May 31, 2000 subject to being reopened for wage adjustments described in sub-paragraph "1" below, and thereafter from year to year until terminated at the option of either party, after sixty (60) days notice in writing to the other.

1. In those areas so stated within contract, the hourly wage rate and fringes have been negotiated for the full term of this agreement.

Intervenor Laborers contends that this contract covers the laborers in the Employer's telecommunications division and bars the instant petition. There is no evidence that Intervenor Laborers ever demanded recognition based on a claim of majority status or that the Employer acknowledged that Intervenor Laborers represented a majority of the Employer's employees in an appropriate unit. However, the Intervenor Laborers' contract contains a union security

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<sup>11/</sup> This contract does not define the term "laborers' work."

provision requiring union membership after an employee's 8<sup>th</sup> day of employment. On March 14, 2000, the Intervenor Laborers forwarded a letter to the Employer with a subject heading reading

"Re-Opening of Cable Installation Agreement." Relevant portions of the letter state: <sup>12/</sup>

The Wisconsin Laborers' District Council is hereby notifying your company of our intent to open the Cable Installation Agreement for the purpose of upgrading wages, fringes and working conditions of our Agreement.

If your firm wishes to participate in negotiations, please contact this office no later than April 15, 2000, so we may schedule a negotiating meeting. If your company wishes to accept the agreement as negotiated no further communication is necessary.

Petitioner's collective-bargaining relationship with the Employer arose during the terms of the above-described collective-bargaining contracts with the Intervenor. Thus, on April 9, 1998, the Employer signed a letter of assent authorizing the Missouri Valley Line Constructors Chapter, Inc., NECA, Inc., herein called the Association, as its collective-bargaining representative for all matters contained in or pertaining to the current contract between the Association and the Petitioner and agreeing to be bound by that contract and subsequently approved labor agreements. The current contract referenced in the letter of assent, herein called the Petitioner's 1997 contract, was effective by its terms from June 1, 1997 to May 31, 2000. The Petitioner's 1997 contract, in relevant part, provides:

#### ARTICLE II, Section 2.04

The Employer shall recognize the Union as the exclusive representative of all of its Employees performing work within the jurisdiction of the Union for purposes of collective bargaining with respect to rates of pay, hours of work and other conditions of employment.

The Petitioner's 1997 contract, among other job classifications, sets forth wage rates for crew foremen, heavy equipment operators, groundmen and drivers and contains a standard construction union security provision providing for union membership after an employee's 8<sup>th</sup> day of employment. The Petitioner maintains that this contract covers all the construction employees in the Employer's telecommunications division. None of the parties maintain that this contract bars any election which might be conducted in the instant matter.

#### ANALYSIS:

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<sup>12/</sup> The record does not contain any evidence that the Employer is a member of any multi-employer bargaining association or that it has ever agreed to be bound by negotiations between Intervenor Laborers and any such association.

(a) Contract Bar:

In order to bar an election, a contract must contain substantial terms and conditions of employment sufficient to stabilize the parties' bargaining relationship and it must be signed prior to the filing of a rival petition. *Seton Medical Center*, 317 NLRB 87 (1995); *Appalachian Shale Products Co.*, 121 NLRB 1160 (1958). Construction industry contracts entered into pursuant to Section 8(f) of the Act will not serve as a bar to petitions, but a construction industry contract between parties who have established a Section 9(a) bargaining relationship will bar an election. *John Deklewa & Sons*, 282 NLRB 1375, 1385 (1987). In order to constitute an election bar, a contract must embrace an appropriate unit. *Movable Partitions, Inc.*, 175 NLRB 915, 916 (1969). Accordingly, members only contracts will not serve as a bar. *Ron Wiscombe Painting & Sandblasting Company*, 194 NLRB 907, 908 (1972).

(b) Intervenor Operators' Contracts:

During the term of Intervenor Operators' 1997 contract and prior to the filing of the petition, the Employer signed several fringe benefit fund reports in which the Employer agreed to be bound by provisions relating to pension, health, vacation and educational funds contained in unspecified labor agreements. However, the Employer never signed the Intervenor Operators' 1997 or 2000 multi-employer contracts. Assuming that the fringe benefit fund reports were understood by the parties to refer to Intervenor Operators' 1997 or 2000 contracts, the fund reports merely provided that the Employer agreed to be bound only to a limited portion of those contracts involving contributions to the fringe benefit funds.<sup>13/</sup> Therefore, to the extent that the fringe benefit fund reports might constitute collective-bargaining agreements, the scope of the agreements is limited to fringe benefit contributions which is too insubstantial to stabilize the parties' bargaining relationship as required by *Appalachian Shale*. Moreover, there is no record evidence that the fringe benefit fund reports were signed by Intervenor Operators. Thus, although the reports are signed by the Employer, they could not constitute a bar to an election because they were not signed by all parties to the collective-bargaining relationship.

With respect to the 1997 contract, I conclude that by informing the Employer in its November 30, 1999 letter that it desired to open contract negotiations, Intervenor Operators terminated the 1997 contract which forestalled any possible automatic renewal. In its reopener letter, the Intervenor Operators expressly stated that the contract was opened to bargain a new agreement, thereby forestalling automatic renewal under *Bridgestone/Firestone, Inc.*, 331 NLRB No. 24 (2000). Accordingly, the 1997 contract expired on January 31, 2000 and for that additional reason cannot serve as a bar to an election.

Intervenor Operators' reliance on *NLRB v. R. J. Smith Construction Co.*, 545 F.2d 187 (D.C. Cir. 1976); *Carpenters Local 1471 v. Bar-Con, Inc.*, 668 F. Supp. 560 (S.D. Miss. 1987) and *KWC Furniture Company, Inc.*, 247 NLRB 541 (1980), in support of its contention that the

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<sup>13/</sup> Intervenor Operators asserts in its brief that the language on the fringe benefit fund reports incorporates its contracts by reference and that the Employer, by signing the forms, agreed to be bound by the contracts. However, I find that only the fringe benefit contribution provisions of the contracts were incorporated by reference and that the Employer agreed to be bound only by those portions.

1997 contract automatically renewed, is misplaced. The employer in *Smith* never gave notice under the termination provisions of the contract but merely argued that pleadings in an unfair labor practice proceeding were sufficient to forestall automatic renewal. The termination notice in *Bar-Con* was found to be untimely and there was no issue, like here, whether a timely notice was sufficient to forestall automatic renewal. In *KWC*, the contract provided for either termination or reopening. That contract expressly specified that a notice to open would not constitute a notice to terminate or forestall automatic renewal. In *KWC*, the Board concluded, based on the explicit contractual language, that a notice to open did not terminate the contract or forestall automatic renewal. Here, there is no such contractual distinction. *Bridgestone/Firestone, Inc.*, 331 NLRB at p. 4 (distinguishing *KWC*).

Moreover, even assuming that under general Board precedent the Intervenor Operators' 1997 contract automatically renewed or that the Employer adopted the 2000 agreement, such contracts still would not bar the instant petition. Thus, although the contracts between the Employer and the Intervenor Operators, including the Intervenor Operators' 1997 contract, establish a Section 9(a) relationship, based on claimed majority support, and the Employer's acknowledgement of such majority status, the 1997 contract was never signed by the Employer. Neither did the Employer sign the Intervenor Operators' 2000 contract. In *Appalachian Shale*, supra, the Board held that "unless a contract signed by all the parties precedes a petition, it will not bar an election even though the parties consider it properly concluded and put into effect some or all of its provisions." See also, *B.C. Acquisitions, Inc.*, 307 NLRB 239, 240, n. 4 (1992); *DePaul Adult Care Communities, Inc.*, 325 NLRB 681 (1998). Such cases, as *Arco Electric Company*, 237 NLRB 708 (1978); and *E.S.P. Concrete Pumping, Inc.*, 327 NLRB No. 134 (1999), are correctly cited in the briefs of the Employer and Intervenor Operators for the proposition that parties may, by their conduct, adopt collective-bargaining agreements which are enforceable under Section 8(a)(5) of the Act. However, although a contract may be enforceable under Section 8(a)(5) of the Act, even though it is not signed, such contract does not bar an election under the principles of *Appalachian Shale*, supra. In *DePaul Adult Care Communities, Inc.*, supra, the Board held that "the moment of apparent contract formation serves as a yardstick for determining when an employer may, in the context of an alleged unfair labor practice, raise a good faith doubt as to a union's majority status, it is no moment in a contract-bar context, if the collective-bargaining agreement is unsigned." *DePaul Adult Care Communities, Inc.*, 325 NLRB at 682. See also, *Tinton Falls Conva Center*, 301 NLRB 937 (1991) (the Board found a contract did not bar a representation petition where the union and employer entered into the agreement, enforceable under Section 8(a)(5), and abided by its terms for more than 15 months).

Finally, the contracts between the Employer and Intervenor Operators would not constitute a bar to an election for the additional reason that they do not cover an appropriate unit. Intervenor Operators never enjoyed exclusive representation status as both its 1994 and 1997 contracts, as well as its 2000 agreement, encompassed an inappropriate unit. Thus, the Intervenor Operators' contracts were actually applied to only a fragment of the covered operator classification. Moreover, during the term of these agreements, the contracts between the Employer and both Intervenor Laborers and Petitioner also covered a number of the employees in the same operator classification. Such circumstances renders inappropriate the unit covered by the Intervenor Operators' contracts under the same rationale that the Board finds members only units to be inappropriate. In determining representative status or whether a unit is

appropriate, the Board may look behind specific language of a collective-bargaining agreement to determine its actual application.<sup>14/</sup> Regardless of whether the contracts are viewed solely on the basis of contractual language or if their actual application is taken into account, it is evident that Intervenor Operators was not the exclusive collective-bargaining representative of any appropriate unit as required by the language of Section 9(a) of the Act. *Moveable Partitions, Inc.*, supra.

Based on the foregoing, the entire record and having carefully considered the arguments of the parties at the hearing and in their briefs, I conclude that any contract between the Employer and Intervenor Operators does not constitute a bar to an election in the instant case.

(b) The Intervenor Laborers' Contracts:

I have also concluded that the Intervenor Laborers' contract is a Section 8(f) agreement which does not constitute a bar to an election. *John Deklewa & Sons*, 282 NLRB at 1387. Here, the contract at issue merely provides that the Employer acknowledges that the Intervenor Laborers is the exclusive representative of the employees in the classifications covered by the agreement. There is no contention, or evidence, that the Intervenor Laborers ever demanded recognition as the employees' Section 9(a) representative or submitted, or offered to submit, proof of majority support or that the Employer recognized or indicated that it was satisfied the Intervenor Laborers represented a majority of its employees in an appropriate unit. Thus, the Employer did not confer Section 9(a) status on the Intervenor Laborers by executing the 1997 contract and this agreement between the Employer and Intervenor Laborers created, at most, a Section 8(f) relationship. *Oklahoma Installation Company*, 325 NLRB 741 (1998). Cf. *H.Y. Floors and Gameline Painting, Inc.*, 331 NLRB No. 44 (2000). Unlike in *VFL Technology Corporation, Inc.*, 329 NLRB No. 49 (1999), cited by the Intervenor Laborers in its brief, the Intervenor Laborers did not thereafter obtain and offer evidence of majority status and the Employer never subsequently acknowledged Intervenor Laborers as the majority representative in an appropriate unit. Thus, even assuming the 1997 contract between the Employer and the Intervenor Laborers automatically renewed, which is doubtful under the holding in *Bridgestone/Firestone, Inc.*, supra,<sup>15/</sup> and further assuming such contract was in effect at the time the petition was filed, it was merely a Section 8(f) agreement which does not bar the current proceeding. *John Deklewa & Sons*, supra.

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<sup>14/</sup> Contrary to the assertions in Intervenor Operators' brief, *Decorative Floors, Inc.*, 315 NLRB 188 (1994); *Pierson Electric, Inc. d/b/a Gold and West Electric*, 307 NLRB 1494 (1992), do not stand for the proposition that the Board does not examine extrinsic evidence outside of the contract to determine the existence of a Section 9(a) relationship. The Board specifically noted in *Decorative Floors* that it had considered such extrinsic evidence citing *Pierson Electric*.

<sup>15/</sup> When viewed in isolation, the first paragraph of Intervenor Laborers' March 14, 2000 letter would appear to forestall automatic renewal under the principles of *Bridgestone/Firestone*. However, one could arguably construe the last sentence of the letter to mean that by its silence, the Employer acquiesced in the automatic renewal of the 1997 contract. Because I am unaware of any precedent bearing on the effect of this last sentence on a claim of automatic renewal, there exists some doubt as to whether the March 14, 2000 letter forestalled automatic renewal of the 1997 contract. In any event, I find it unnecessary to reach a conclusive determination on this issue since I conclude the Intervenor Laborers' contract is merely an 8(f) agreement.

Moreover, like the contracts with the Intervenor Operators, the Intervenor Laborers' agreement was not applied to employees in the manner set forth in the contract. Thus, the Intervenor Laborers' contract covered an operator and six laborers. At the same time, the contract between the Employer and Petitioner also covered, *inter alia*, six laborers. Thus, it is apparent none of the units, including the one purportedly represented by Intervenor Laborers, was appropriate for bargaining since it was comprised by random selection of employees and perhaps, by union membership or representation. Clearly, the units, including the unit represented by the Intervenor Laborers, were not based on craft or homogenous groupings of employees. Inasmuch as employees in the same job classifications are represented by different labor organizations, such circumstances would render the units covered by the contracts, like a members only unit, inappropriate and would prevent the contracts, including the contract between the Employer and Intervenor Laborers, from barring an election to the same extent that a members only contract would not bar a petition. *Moveable Partitions, Inc.*, supra; *Ron Wiscompe Painting*, supra.

Based on the foregoing, the entire record and having carefully considered the arguments of the parties at the hearing and in their briefs, I find that the contractual arrangements between the Employer and Intervenor Laborers do not bar processing of the petition.

(c) Appropriate Unit:

Inasmuch as I have found that none of the contracts with the Employer bars processing the petition, I must now determine the appropriate unit(s) in which to conduct an election. Section 9(a) of the Act only requires that a unit sought by a labor organization be an appropriate unit for purposes of collective bargaining and there is nothing in the statute which requires that the unit for bargaining be the only appropriate unit, or the ultimate unit or even the most appropriate unit. *Morand Brothers Beverage Co.*, 91 NLRB 409, 418 (1950). Moreover, the unit sought by a labor organization is always a relevant consideration and a union is not required to seek representation in the most comprehensive grouping of employees unless an appropriate unit compatible to that requested does not exist. *Purity Food Stores*, 160 NLRB 651 (1966). It is also possible that more than one unit may be appropriate among employees of a particular enterprise. *Chin Industries, Inc.*, 232 NLRB 176(1977); *Overnite Transportation Co.*, 322 NLRB 723, 726 (1996). A finding that a broad unit may be appropriate does not foreclose the possibility that smaller components of that broader unit may also be appropriate. *City Electric, Inc.*, 225 NLRB 325 (1976). Moreover, units in the construction industry may be appropriate on the basis of either a craft or departmental grouping of employees so long as the employees are a clearly identifiable and homogenous group with a community of interest separate and apart from other employees. *Brown & Root Braun*, 310 NLRB 632, 635 (1993); *Johnson Controls, Inc.*, 322 NLRB 669, 672 (1996). However, a unit cannot be found appropriate simply on the basis of a labor organization's desire or extent of organization. Thus, a labor organization carries the burden of coming forward with sufficient evidence to support a finding that the unit it seeks is appropriate for purposes of collective bargaining. *P. J. Dick Contracting, Inc.*, 290 NLRB 150, 151, n. 8 (1988).

As an initial matter, I note that the record here reflects a history of collective bargaining which is, as discussed under the contract bar issues, akin to members only representation. Such a prior bargaining history is not entitled to any deference or weight in determining an appropriate unit for purposes of collective bargaining. *Manufacturing Woodworkers*, 194 NLRB 1122, 1123 (1972).

The record discloses that the construction employees in the Employer's telecommunications division share common supervision in a single organizational grouping of the Employer's operation. Thus, such employees may constitute an appropriate departmental unit. Further, the telecommunications division employees work together in crews without regard to their job classifications and their work on those crews is functionally integrated. Inasmuch as the employees in the Employer's sewer and water division are separately represented and none of the parties contend that any of the sewer and water employees should be included in any unit found appropriate, the overall telecommunications employee unit sought by the Petitioner is presumptively appropriate.

My finding that the telecommunications division employees constitute an appropriate unit does not foreclose the possibility that separate units of operators and laborers within that division may also be appropriate. *City Electric*, supra. However, based on this record, I conclude that the evidence is insufficient to find that separate units of operators and engineers are appropriate. The only evidence of any distinction between operators and laborers is that the former operate heavy equipment and the latter should not. The record indicates that both classes of employees operate auxiliary equipment. Moreover, the record does not disclose the extent to which operators' duties are limited to the operation of heavy equipment. Thus, the fact that operators spend some unspecified portion of their work time operating heavy equipment is insufficient to overcome the fact both operators and laborers operate auxiliary equipment and work together in crews performing functionally integrated work. Given the paucity of record evidence on this issue, I am unable to determine the extent, if any, to which laborers and operators perform exclusive as opposed to common job functions; whether their supervision is common or separate; and the extent to which their wages, hours or terms or conditions of employment may differ. Indeed, all employees appear to work together in co-mingled crews and perform overlapping job functions. Under such circumstances, and based on the state of the record evidence, the Intervenor Operators and Intervenor Laborers have failed to meet their burden of establishing that separate units of the operators and laborers are appropriate. Accordingly, I find that only an overall unit of the Employer's construction employees in its telecommunication division is appropriate for purposes of collective bargaining.

The Intervenor's rely on *Brown & Root Braun*, supra, and *Burns and Roe Services Corp.*, 313 NLRB 1307 (1994) in support of their contention that separate laborers and operators units are appropriate. In *Brown & Root*, the evidence bearing on the appropriate unit, although much more substantial and detailed than the evidence in the instant matter, was nevertheless found insufficient to establish that the craft unit sought was appropriate. Like in *Brown & Root*, the evidence here does not support a finding that separate craft units of operators and laborers are appropriate. *Burns and Roe* is clearly distinguishable from the subject case. In *Burns and Roe*, the Board was able to determine that the craft group sought constituted an appropriate unit

because the record there, unlike here, contained evidence of separate skills, separate supervision and lack of overlapping work functions.

### CONCLUSION:

Based on the foregoing, the record as a whole and having carefully considered the arguments of the parties at the hearing and in their briefs, I find that there are no bars to the conduct of an election and that the following employees of the Employer constitute the appropriate unit for the purposes of collective bargaining:

**All construction employees, including general foremen, employed by the Employer in its telecommunications division in the State of Wisconsin, excluding all office clerical employees, all other employees and all professional employees, guards and supervisors as defined in the Act.**

Accordingly, I shall direct an election among the employees in such unit. <sup>16/</sup> Inasmuch as the Employer is engaged in the construction industry, the eligibility of employees to vote in the election shall be determined by the eligibility formula set forth in the Direction of Election. See, *Steiny and Company, Inc.*, 308 NLRB 1323, 1327 (1992).

### **DIRECTION OF ELECTION**

An election by secret ballot shall be conducted by the Regional Director for Region 30 among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Section 103.20 of the Board's Rules and Regulations requires that the Employer shall post copies of the Board's official Notice of Election in conspicuous places at least 3 full working days prior to 12:01 a.m. on the day of the election. The term "working day" shall mean an entire 24-hour period excluding Saturdays, Sundays and holidays. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Also eligible to vote shall be all employees in the unit who have been employed for a total of 30 working days or more within the period of 12 months preceding the

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<sup>16/</sup> Inasmuch as neither of the Intervenor wishes to participate in an election in the overall unit found appropriate, their names shall not be included on the ballot.

eligibility date for the election or who have had some employment in that period and who have been employed

45 working days or more within the 24 months immediately preceding the eligibility date for the election and who have not been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed. *Steiny and Company, Inc.*, supra; *Daniel Construction Co.*, 133 NLRB 264 (1961). Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by the **International Brotherhood of Electrical Workers Local 2150, AFL-CIO**.

### **LIST OF ELIGIBLE VOTERS**

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters using full names, not initials, and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB No. 359 (1994). Accordingly, it is hereby directed that within 7 days of the date of this Decision **4** copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the Regional Director for Region 30 who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in Region 30, National Labor Relations Board, 310 West Wisconsin Avenue, Suite 700, Milwaukee, Wisconsin 53203-2211, on or before **September 8, 2000**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

### **RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the

Executive Secretary, 1099 - 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by **September 15, 2000**.

Dated at Cincinnati, Ohio this 1<sup>st</sup> day of September 2000.

/s/ Richard L. Ahearn

Richard L. Ahearn, Regional Director  
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